



## NORTH CAROLINA LAW REVIEW

Volume 10 | Number 4

Article 2

6-1-1932

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### Recommended Citation

Susie M. Sharp, *Supreme Courts Sitting in Divisions*, 10 N.C. L. REV. 351 (1932).

Available at: <http://scholarship.law.unc.edu/nclr/vol10/iss4/2>

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## SUPREME COURTS SITTING IN DIVISIONS\*

SUSIE M. SHARP\*\*

During the calendar year 1929 the Supreme Court of North Carolina handed down 429 opinions, an average of 86 opinions a year for each justice. In addition to participating in 44 *per curiam* cases, each justice thus wrote an average of two opinions per week during term time. In Georgia that year the average number of opinions per justice was 75; in South Carolina, 52; in West Virginia, 48; in Tennessee, 36; in Virginia, 23; and in Maryland, 19.<sup>1</sup> It appears, therefore, that North Carolina's Supreme Court is in need of relief.

By constitution or statute efforts have been made to handle the increasing business of the appellate courts in one or more of the following ways: (1) An increase in the number of justices of the highest state court; (2) the appointment of supreme court commissioners; (3) the creation of intermediate appellate courts; (4) the appointment of skilled young lawyers as law assistants or clerks for each member of the supreme court to save the time of the justice by performing a part of his legal research; (5) the assignment of judges from other courts to sit from time to time as temporary members of the supreme court; or (6) authorizing the supreme court to sit in divisions.

This report is concerned only with the latter expedient.

The following states by constitutional provision authorize their highest appellate court to sit in divisions: California,<sup>2</sup> Colorado,<sup>3</sup> Florida,<sup>4</sup> Georgia,<sup>5</sup> Kansas,<sup>6</sup> Louisiana,<sup>7</sup> Mississippi,<sup>8</sup> Missouri,<sup>9</sup> and Virginia.<sup>10</sup> The constitution of Washington<sup>11</sup> gives the legislature power to provide for departments. Authority for the divisional ar-

\* This is one of a series of reports made by the Law School at the request of the Constitutional Revision Commission of North Carolina.

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<sup>1</sup> Note (1930) 8 N. C. L. REV. 487.

<sup>2</sup> CALIF. CONST. VI, §2.

<sup>3</sup> COLO. CONST. VI, §5.

<sup>4</sup> FLA. CONST. V, §4.

<sup>5</sup> GA. CONST. VI, §2, No. 8.

<sup>6</sup> KAN. CONST. III, §2.

<sup>7</sup> LA. CONST. VII, §4.

<sup>8</sup> MISS. CONST. §§286, 287.

<sup>9</sup> MO. CONST. VI, §1 (Amendment of 1890).

<sup>10</sup> VA. CONST. VI, §88.

<sup>11</sup> WASH. CONST. IV, §2.

rangement is conferred by statute in Alabama,<sup>12</sup> Iowa,<sup>13</sup> Oklahoma,<sup>14</sup> and Oregon.<sup>15</sup>

The highest courts of California, Kansas, Louisiana, Oklahoma, and Virginia, however, do not now exercise this power. Their reasons are discussed in the latter part of this paper. Thus we have nine states, out of the fourteen permitted to do so, which are actually operating under the divisional plan.

The following information about the effects of divisional sittings in these fourteen states has been obtained from their constitutions, statutes and rules, law review articles, and letters from the chief justices and lawyers.

#### PERSONNEL OF DIVISIONS

*How selected and who constitutes?* In Alabama,<sup>16</sup> California,<sup>17</sup> Colorado,<sup>18</sup> Georgia,<sup>19</sup> Iowa,<sup>20</sup> Oregon,<sup>21</sup> and Washington<sup>22</sup> the chief justice assigns the associate justices to divisions. In Iowa the personnel may also be changed by an affirmative vote of the majority of the justices.<sup>23</sup> In Mississippi the state is divided into three supreme court districts, two judges being elected from each district. The personnel of the divisions is determined by an order entered on the minutes of the court *en banc*, the custom being to assign a judge from each district to one of the divisions. In other words, each division is composed of one judge from each district. The chief justice sits with the division to which he is assigned. In Florida when a new chief justice is chosen he and the presiding justice select their associates for the respective divisions. The constitution of California<sup>24</sup> and statutes in Washington<sup>25</sup> and Oregon<sup>26</sup> provide that judges may interchange by agreement.

*How often is the personnel of divisions changed?* In Alabama, the divisions are arranged according to seniority, that is, the senior

<sup>12</sup> ALA. ANN. CODE (Michie, 1928) §10270.

<sup>13</sup> IOWA CODE (1931) §12802.

<sup>14</sup> OKL. COMP. STAT. ANN. (1921) §3034.

<sup>15</sup> ORE. CODE ANN. (Off. ed., 1930) §28-206.

<sup>16</sup> ALA. ANN. CODE (Michie, 1928) §10270.

<sup>17</sup> CALIF. CONST. VI, §2.

<sup>18</sup> By custom or rule of court.

<sup>19</sup> GA. ANN. CODE (Michie, 1926) §6112.

<sup>20</sup> Rule 1, Supreme Court of Iowa.

<sup>21</sup> ORE. CODE ANN. (Off. ed., 1930) §28-206.

<sup>22</sup> WASH. COMP. STAT. (Remington, 1922) §8.

<sup>23</sup> Rule 1, Supreme Court of Iowa.

<sup>24</sup> CALIF. CONST. VI, §2.

<sup>25</sup> WASH. COMP. STAT. (Remington, 1922) §8.

<sup>26</sup> ORE. CODE ANN. (Off. ed., 1930) §28-206.

associate is put on one and the next ranking associate on the other. The only change comes when a judge retires and a new one replaces him. The chief justice can, of course, put one judge on another section in cases of absence of a regular member. The personnel of divisions in Colorado is changed upon the retirement of a member of the court and the incoming of his successor. It may also be changed by the chief justice when he takes office, or as occasion may require. Changes are infrequent. In Florida, the personnel of the division is changed when a chief justice is chosen on Tuesday after the first Monday in January, biennially. If a justice dies or resigns, his successor takes the place vacated on the division. The Georgia code requires the personnel of each division to be changed from time to time so as not to be permanent in constituency.<sup>27</sup> The chief justice makes this change annually in October. In Iowa a statute<sup>28</sup> requires that the chief justice change every six months. The retiring chief justice takes the place of the new chief justice, and this results in a change of the personnel of the divisions every six months.

The Mississippi court was authorized to sit in divisions in 1916.<sup>29</sup> The divisions have since been changed only when there has been a change in the personnel of the court itself. There is a difference of opinion among the judges of this court as to whether the personnel of divisions should be changed at short intervals, or only when a change in the personnel of the court necessitates a change. In Missouri also the personnel of each division remains unchanged.

In Oregon the justices are changed back and forth as convenience necessitates. The judge having the shortest time to serve acts as chief justice. In Washington departments are changed each year, and under the rule two judges go from each department to the other. The change is made and the judges assigned to the departments by the chief justice. There is almost never a request from any judge touching the assignments.

*Where does the chief justice sit?* The constitution of California<sup>30</sup> provides that the chief justice may sit in either department, and a statute of Georgia<sup>31</sup> requires him to preside over Division One. In Florida he always presides over Division A. In Missouri the chief

<sup>27</sup> GA. CODE (Michie, 1926) §6112.

<sup>28</sup> IOWA CODE (1931) §12804.

<sup>29</sup> MISS. LAWS 1916, c. 154.

<sup>30</sup> CALIF. CONST. VI, §2.

<sup>31</sup> GA. CODE (Michie, 1926) §6112.

justice does not sit as such in division; each division elects its own presiding judge.

In Alabama,<sup>32</sup> Colorado,<sup>33</sup> Iowa,<sup>34</sup> Oregon,<sup>35</sup> and Washington<sup>36</sup> the chief justice sits with each division. Thus, the two sections are not operating independently of each other and are kept in harmony on the application of principles of law. As the Chief Justice of Alabama puts it, the chief justice prevents the possibility of one division "running over" the other. He also thinks that Alabama's plan is superior to that of those states in which the divisions are equal in number because cases in those states would frequently be decided by less than a majority of the full bench. (For membership of courts and divisions, see chart below.)\* "At first," he writes, "the division

<sup>32</sup> ALA. ANN. CODE (Michie, 1928) §10270.

<sup>33</sup> There is apparently no constitutional or statutory requirement for this practice.

<sup>34</sup> Rule 1, Supreme Court of Iowa.

<sup>35</sup> ORE. CODE ANN. (Off. ed., 1930) §28-206.

<sup>36</sup> WASH. COMP. STAT. (Remington, 1922) §8. It is the practice of the Chief Justice to sit with each division.

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	Number on Bench	Number Divisions Authorized	Number in a Division	Quorum:	
				Division	En Banc
Alabama.....	7	Sections of four	4 and C. J.	4	4
California.....	7	Two but sits <i>en banc</i>	3	3	4
Colorado.....	7	Two or more, actually 3	2 and C. J.	3	
Florida.....	6	Two	3	3	4
Georgia.....	6	Two	3	2	4
Iowa.....	9	Two	4 and C. J.	5	5
Kansas.....	7	Two but sits <i>en banc</i>	3	3	4
Louisiana.....	7	Divisions; sits <i>en banc</i>		3	4
Mississippi.....	6	Two	3	2	
Missouri.....	7 judges; 6 comm's.	Two	Div. 1, 4 judges, 3 Comm's; Div. 2, 3 judges, 3 comm's.	Majority	
Oklahoma.....	9	Two but sits <i>en banc</i>	4		5
Oregon.....	7	Two	3 and C. J.	3	4
Virginia.....	7	Two but sits with 5 judges	3	3	4
Washington.....	9	Two	4 and C. J.	3	5

plan was not as satisfactory as the single bench, lawyers sometime thinking that if they had argued their case before the other section or the entire court they would not have lost it, but when they realized that every case is decided by a majority of the court and that if the four deciding the case stood by their conclusion the general conference would not change the result, they have become reconciled to the present plan, especially since it better enables us to handle the volume of business."

Chief Justice Rivers Buford of Florida writes that a constitutional amendment is pending there which, if adopted, will add a seventh judge to the court and that the purpose of this amendment is to enable the Florida court to work under the same plan as that which obtains in Alabama. Florida's divisions now number three judges each.<sup>37</sup> Justice Armstead Brown, in discussing this amendment before the Florida State Bar Association,<sup>38</sup> said that Alabama's court turns out decisions more rapidly than Florida's because Alabama's divisions consist of four justices each, the chief justice sitting as a member of each section.

"I do not hesitate," says Justice Brown, "to say that I have for several years been strongly of the opinion that the Supreme Court of this state should have added to its membership one more justice, thus giving us a court of seven members, and that, at least until we can catch up with the docket, the court should sit in two practically independent divisions of four each, the chief justice sitting as a member of each division, serving to keep them in harmony with each other on the principles of law being decided; that each division of four, constituting a majority of the court, when acting together without dissent, should have full power to affirm or reverse cases, with or without written opinion, to the full extent of power now exercised by the entire court, and without submitting their opinion or decisions to the other division. Thus each division of four would represent a quorum of the entire court. This plan would undoubtedly enable the court to dispose of a considerably larger volume of work."

Chief Justice Faville of Iowa states that he likes the division plan of Iowa and Alabama better than that of Florida. "I think it better," he says, "for the chief justice to sit in both divisions because in that way he is in a much better situation to avoid any possible conflict between the two."

<sup>37</sup> FLA. CONST. V, §4.

<sup>38</sup> 3 FLA. ST. BAR ASS'N L. J. 32, 37.

In Mississippi, as already observed, the chief justice sits with the division to which he is assigned according to the district from which he is elected.

*Who presides when the chief justice does not?* In Alabama, by statute,<sup>39</sup> the associate justice who has precedence presides. In Washington there is no provision for a presiding officer other than the chief justice. In Oregon, by statute,<sup>40</sup> each division elects a judge to preside in the absence of the chief justice. The constitution of Colorado<sup>41</sup> provides that in the absence of the chief justice the judge present who would next be entitled to become chief justice shall preside; it is a rule of seniority. By rule of court in Iowa<sup>42</sup> when the chief justice is unable to act he selects some judge to act for him during his absence. If he is unable to make the selection the court selects one of its other members to act. The constitution of California<sup>43</sup> provides that the justices assigned to a department shall select one of their number to preside and that in the absence of the chief justice the court shall select a substitute. In Florida and Mississippi the oldest judge in point of service presides over Division B. In Georgia, by statute, the chief justice selects the presiding officer of the Second Division.<sup>44</sup> In Missouri, each division selects its own presiding judge for two years.

#### HOW CASES ARE ASSIGNED TO DIVISIONS

In all the states using the divisional plan, the cases are assigned to divisions either by the chief justice or the clerk. In Alabama, Georgia, Iowa, Mississippi, and Missouri, the clerk assigns the cases. In California,<sup>45</sup> Colorado,<sup>46</sup> and Oregon<sup>47</sup> the chief justice does it. In Florida when cases are filed in the clerk's office they are numbered chronologically. Odd numbers are assigned to Division A, even numerals to Division B. In practice in Colorado, any judge may draw out from the clerk's office the oldest case at issue, not previously assigned. In Georgia the chief justice may assign a special case to one of the divisions for various reasons if he wishes.

<sup>39</sup> ALA. ANN. CODE (Michie, 1928) §10270.

<sup>40</sup> ORE. CODE ANN. (Off. ed., 1930) §28-206.

<sup>41</sup> COLO. CONST. VI, §8.

<sup>42</sup> Rule 7-a, Supreme Court of Iowa.

<sup>43</sup> CALIF. CONST. VI, §2.

<sup>44</sup> GA. ANN. CODE (Michie, 1926) §6112.

<sup>45</sup> CALIF. CONST. VI, §2.

<sup>46</sup> Apparently this is either a rule of court or custom.

<sup>47</sup> ORE. CODE ANN. (Off. ed., 1930) §28-206.

In Missouri Division Two hears all criminal cases and enough civil cases to equalize its volume of work with that of Division One. In Washington, as the departments sit in alternate weeks, cases are not assigned with reference to departments at all, but follow a general plan and fall to either department as may happen.

#### PROPORTIONATE WORK OF THE CHIEF JUSTICE

The chief justices of Alabama, Colorado, Iowa, Oregon, and Washington do not write as many opinions as the other justices. In Florida, Georgia, and Missouri they do.

For years after the division plan was adopted in Alabama the chief justice was assigned only half as many cases as the other justices. Chief Justice Anderson, however, says that since he has been chief justice he has written two-thirds as many opinions as the others. This would seem too great a load for a chief justice sitting with both divisions and Chief Justice Anderson remarks that his duties are "quite taxing and rather difficult."

The chief justices of Iowa and Washington write one-half as many opinions as the others because they sit in open court twice as long. In Mississippi when cases are submitted the records are assigned to the judges according to docket number and each judge receives the same number of records. Opinions are written only in cases reversed or affirmed and remanded, or if affirmed and not remanded, in cases involving new principles of law or new applications of old principles. From this it follows that there may result an inequality in the number of opinions written by the various judges. The number of opinions written by the chief justice depends upon the foregoing. In Missouri the chief justice is expected to write as many opinions as the other judges but is relieved of the duty of examining applications for extraordinary remedies, several hundred of which are filed annually.

#### HOW OFTEN DO DIVISIONS SIT?

The divisions of each state sit alternately except in Missouri where they usually sit simultaneously, although each may determine its own time save that regular terms in April and October must be held each year as provided by law. When not hearing oral arguments the Missouri court adjourns from day to day the year round and practically all the time between sittings is consumed in writing opinions and passing on applications for extraordinary remedies.



In Alabama there is always a week or several weeks between the sittings when one division can be writing opinions. In Florida, Division A sits Tuesday and Wednesday of each week and Division B sits Thursday and Friday of each week as long as the justices keep up with the disposition of cases which have been heard. When an accumulation occurs in either divisions, oral arguments are suspended without reference to the other division until such time as that division so suspending oral arguments directs the clerk to set cases again for oral arguments. There is no rule of practice which controls the number of cases assigned to each justice. The assignments are based upon the convenience of the respective justices in that regard.

In Georgia both divisions sit in the months of March and October. On the first Monday of each of these months the first division meets and on the third Monday of each of said months the second division meets. The first division then sits the third Monday in November and April, and the second division the third Monday in December and May, and so on until the end of each respective term. The arguments before each of the divisions require about four days and the remainder of the time is devoted to the writing and consideration of opinions.

In Iowa the court sits *en banc* at three stated periods during the year. At other times it sits only in divisions. Judges of each division have three weeks time for writing opinions and a week in each month for sitting in court for submissions. In Mississippi and Washington the divisions sit alternately, one each week. In Oregon the departments sit alternately, taking the necessary time for writing opinions and hearing arguments as fast as opinions can conveniently be written. The opinions in each department are examined and consultations often held with the justices of the other department.

#### WHAT CASES ARE HEARD EN BANC

The following list gives the questions required to be submitted to the full bench in the various states:<sup>48</sup>

Cases involving the construction of the constitution (Alabama, California, Colorado, Florida, Mississippi, and Oklahoma. In Iowa the case goes to the full court upon the application of either party).

Cases which involve overruling a prior decision (Alabama, Mississippi, and Oklahoma).

<sup>48</sup> Some of these requirements are statutory; others, constitutional or rules of court, while some seem to be merely practice.

Capital cases where the penalty has been imposed (Alabama, California, Colorado, and Florida).

Reversal of the intermediate appellate court (Alabama).

Cases in which there has been a dissent in division (Alabama, Florida, Georgia, Iowa, Mississippi, Missouri, Oklahoma, and Washington).

Questions of great public importance (California, Colorado, Florida, Missouri, and in Washington when a special request is made).

Any case which the chief justice may order (California, Iowa, and Oregon).

Such cases as the court may determine (California, Colorado, Georgia, Iowa, Mississippi, Missouri, and Oregon).

Such cases as a division may order (Missouri).

Civil or chancery cases in which the state is a party (Florida).

Construction of new statutes (Iowa).

Cases involving a Federal question (Missouri).

#### DELAYED FINALITY FOR DECISIONS IN TWO STATES

In Washington<sup>49</sup> division decisions are not final until the expiration of thirty days unless approved by the chief justice and a majority of the court. California's constitution<sup>50</sup> provides that division decisions are not final until after thirty days unless approved by the chief justice and two associate justices in writing.

#### SPECIALIZATION IN A DIVISION

As already noted, in Missouri Division Two hears all criminal cases and enough civil cases to equalize its volume of work with that of Division One. None of the statutes or constitutions requires such specialization and, so far as indicated by the letters of the chief justices, Missouri is the only state in which such an allotment of cases is made. The Institute of Public Affairs of the University of Georgia, however, in its proposed constitution for Georgia, suggests the following provision: "The Supreme Court shall consist of not less than two divisions, at least one of which shall be a criminal division. Each division shall be composed of an odd number of justices, a majority of whom shall constitute a quorum."<sup>51</sup>

#### PRACTICAL OPERATION

The plan of the split appellate court raises many practical questions of interest to the bar and bench of a state unused to the idea.

<sup>49</sup> WASH. COMP. STAT. (Remington, 1922) §10.

<sup>50</sup> CALIF. CONST. VI, §2.

<sup>51</sup> A PROPOSED CONSTITUTION FOR GEORGIA, Art. 5, §2.

(1) Do attorneys attempt to have cases set before one division rather than the other? If so, is this possible? (2) Does the plan increase motions for rehearing? (3) Does it obtain as much uniformity of decision as a court sitting *en banc*? (4) What is its effect upon the court's ability to keep abreast of the calendar?

(1) The chief justices were unanimously of the opinion that lawyers did not attempt to have cases heard before one division rather than another. Attorneys know nothing of the cases awaiting to be heard, the order in which they are set, or the order in which they will fall; so if such an attempt were made it would be futile.

(2) The chief justices are equally unanimous in the view that the plan does not increase motions for rehearing.

(3) Chief Justice Henry J. Bean of Oregon says that his observation is that during the last twenty-one years there has not been "quite so much uniformity of decision" as when the court sat *en banc*. The other chief justices are all of the opinion that there is not any such divergence. "Inasmuch as all cases in which opinions are written are considered by the entire court, the division system does not affect uniformity of decision," writes Chief Justice Rivers Buford of Florida. The chief justices of Alabama, Iowa, and Washington say that the chief justice sitting with each division and being familiar with the opinions written in each division easily prevents a divergence of views between the two divisions and keeps the court in harmony. In Oregon, Iowa, Colorado, Florida, and Washington—and perhaps the other states—every opinion is circulated to every judge and each indicates his approval or disapproval. "We have practically no difficulty at all along this line," says Chief Justice Faville of Iowa.

All cases in Georgia, although most of them are argued before a division, are decided by the court *en banc*. The chief justice, in addition to designating the personnel of the two divisions, divides the court into three pairs of justices for consultation purposes each year. After argument upon each case, it is assigned to a justice. That justice, together with his consulting associate tentatively decides upon a disposal of the case. Then the justice to whom the case is assigned writes an opinion. This opinion is read before the court *en banc*, is discussed and finally voted upon. Although authority is given for the supreme court to decide cases in separate divisions, that procedure is not followed. No case is decided by the court except *en banc*.

Therefore there is no appreciable change in uniformity of decision from the old procedure.

(4) The nine states which are actually using the division plan have found that it enables them to keep abreast of the docket. Chief Justice Sydney Smith of Mississippi says that when the court was authorized to sit in divisions it was nearly three years behind with its work, and that it now practically clears the docket each year.<sup>52</sup> Chief Justice Henry J. Bean of Oregon says the same thing. Chief Justice Buford of Florida says: "I can unhesitatingly say that the division plan has proved more satisfactory than the single bench plan in enabling the court to facilitate the disposition of cases."

"I think that our method is a tremendous saving of time," writes Chief Justice Faville of Iowa. "We can decide and file between seven and eight hundred opinions a year, and do this frequently. If we sat *en banc* it would be impossible for us to do much more than half of this work." The Iowa court has nine members and two divisions of four each.

Chief Justice Warren W. Tolman of Washington says that the work of the supreme court is too great to be handled by one department and that after some twenty-three years experience with the division plan they are still satisfied with it.<sup>53</sup> Dean Hilkey of the Emory University Law School says that the division plan expedites considerably the work of the Georgia court. Chief Justice John T. Adams of Colorado says that the court feels that it would be greatly handicapped in the discharge of its duties if it were not possible to divide its work into departments. For many years the Colorado court had three departments. These were reduced to two, but very recently the court has reverted to the former plan of three divisions to expedite the transaction of business. "The fact that we can do this, as occasion requires, would seem to attest the desirability of a flexible constitution," says the Chief Justice.

#### COURTS WHICH DO NOT SIT IN DIVISIONS ALTHOUGH AUTHORIZED TO DO SO

*California.* California's constitutional provisions for the split court contain more detail than those of any other state. However,

<sup>52</sup> For a description of the Mississippi court see Butts, *The Supreme Court of Mississippi* (1930) 3 MISS. L. J. 97, 105.

<sup>53</sup> For a description of the Washington court see Parker, *A Supreme Court with Two Divisions* (1923) 6 J. AM. JUD. SOC. 177. See also Schweppe, *Possible Methods of Relieving the Supreme Court of the State of Washington* (1929) 4 WASH. L. REV. 1.

Chief Justice William H. Waste writes as follows: "For the past ten years the court has during only one year sat in departments. We have in this state the District Courts of Appeal, each division consisting of three justices, which we regard in effect and practical result as departments of the Supreme Court, the litigants having the right to approach this court for a hearing after decision of the District Court of Appeal. The attitude of the bar of this state, based largely upon the fact that practically all questions other than of the nature indicated above are first heard by the District Court of Appeal, is that the Supreme Court should sit in bank."

*Kansas.* Kansas had tried various expedients for relieving the appellate court. A Supreme Court Commission was created to assist in handling the business of the court but this proved unsatisfactory, as did the intermediate appellate court plan which followed. The result was that in 1900 a constitutional amendment was adopted providing for a court of seven members and authorizing it to sit in two divisions. At that time the court was about three years behind with its work. The court sat in divisions until the close of the July session in 1902. Since then it has sat *en banc*. Associate Justice R. A. Burch of the Kansas court says: "The division plan proved satisfactory in the matter of bringing court abreast of the filing of cases. It did not prove very satisfactory to litigants, and consequently for nearly thirty years we have not resorted to the division plan."

*Louisiana.* In 1921 Louisiana adopted a new constitution which permitted the supreme court, as regularly constituted, to divide itself into two sections. It further provided that the court might form a third section by calling to its assistance two judges of the intermediate Courts of Appeal of which there are three.<sup>54</sup> In 1922 the supreme court called in two judges from the courts of appeal and increased its membership to nine, and for one and a half years sat in three sections. At the end of that time, the court had caught up with its docket to a considerable extent. The experiment of sitting in sections was then discontinued, and the court has since sat and now sits only in one section.

Mr. Monte M. Lemann of New Orleans, in discussing the situation before the 1929 meeting of the Association of American Law Schools said, "So far as I have been able to ascertain from informal discussion with members of the court and the bar, the preponderance of opinion is now against the division of the court into sections, but

<sup>54</sup> See discussion in 29 LA. ST. BAR ASS'N J. 45-51 (1929).

some of those who still incline to the sectional arrangement are among those who have given the most thoughtful consideration to the matter, and the justice who originally advocated it as a wise plan, after an experiment with it, is still of the same opinion."<sup>55</sup>

*Oklahoma.* Chief Justice E. F. Lester of Oklahoma reports that he has no knowledge of Oklahoma's court ever having sat in divisions. He thinks that with a full court the conference acts with more dispatch than with merely a bare quorum present for the reason that it often happens that those dissenting in conference, together with the absentees, make it impossible to obtain a constitutional majority for an opinion.

*Virginia.* Virginia has not yet taken advantage of the provision in the constitution of 1928 authorizing the split appellate court but has adopted a compromise plan. The court is composed of seven members but functions with five judges sitting except in cases involving constitutional questions which are heard by a full court. Three judges are required to pronounce all opinions except constitutional questions which require four. There is no definite method of determining which two judges will not sit. This is usually done by mutual agreement for the convenience of the two judges. Chief Justice Preston W. Campbell states that he does not favor the constitutional provision because he fears that it would militate against uniformity of decision. Under the constitution which authorizes the court to sit in "two divisions, consisting of not less than three judges each, as the court may from time to time determine" it would be possible for the Virginia court to function under Alabama's plan with the Chief Justice sitting in each division. It is submitted that this would be an effective means of guarding uniformity of decision and more in keeping with the wishes of the framers of the constitution.<sup>56</sup>

#### CONCLUSION

The 1927 Report of the Commissioners to Suggest Amendments to the Constitution to the General Assembly of Virginia contains the following explanation of section 88 of Article VI, authorizing the highest court to sit in divisions:<sup>57</sup>

"The General Assembly has already approved an amendment pro-

<sup>55</sup> HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE 27TH ANNUAL MEETING (1929) 101.

<sup>56</sup> See *infra*, n. 57.

<sup>57</sup> REPORT OF THE COMMISSION TO SUGGEST AMENDMENTS TO THE CONSTITUTION TO THE GENERAL ASSEMBLY OF VIRGINIA, ix.

viding for an increase in the number of judges from five to seven. This, however, will afford little relief unless the court sits in two divisions,<sup>58</sup> and so the section has been redrawn to effect this purpose. The public business requires for its dispatch that the appellate court should be almost continuously in session, and judges cannot write opinions that are worth the writing while hearing arguments and engaged in conferences with reference to the current business. They should have time to write their opinions. A division into two sections, sitting alternately, affords these opportunities. It is deemed best that there should be one court, instead of two, because this will tend to promote uniformity of decision and keep each of the judges in touch with all of the decisions of the appellate court." The Virginia court has not, however, put this plan into effect.

Professor Edson R. Sunderland of the University of Michigan Law School, in an address before the Association of American Law Schools in December, 1929,<sup>59</sup> arguing against an intermediate appellate court system and in favor of the highest court sitting in divisions, said:

"There are three ways in which the divisional arrangement increases the efficiency of the court.

"In the first place, since fewer judges participate in the hearing of each case, the time required for this purpose from each judge could be reduced in proportion to the number of divisions. Or, if it seemed advisable to allow fuller arguments, the time allotted to counsel could be enlarged in the same proportion, without requiring longer hours from the judges. . . .

"In the second place, each judge will no longer be expected to investigate all the cases coming before the court and to participate in consultation regarding them, but his duties will ordinarily be limited to those cases assigned to his own division. By this means the number of decisions for which each judge will be responsible can be reduced in exact proportion to the number of divisions.

"In the third place, while the number of opinions to be written by each judge will not be affected merely by organizing the court into divisions, the divisional arrangement will make it practicable to add new judges within reasonable limits, without making the court so unwieldy as to interfere with its effective operation.

<sup>58</sup> See Cain, *The Law's Delays and Some Proposed Remedies* (1920) 90 CENT. L. J. 333, 338.

<sup>59</sup> 6 AM. LAW SCHOOL REV. 693.

"The apparent objections which readily suggest themselves do not seem to be meritorious. One is the possibility of inconsistencies between the different cases decided by the same court at different terms or between an intermediate and a supreme court, or between different divisions of an intermediate court. But the danger of inconsistencies is very small. In any event the judges cannot personally remember prior decisions of the court and must rely upon their own study of the reports and the diligence of counsel, and it will make very little difference whether the prior decisions happen to be made by an undivided or a divisional court."

The Model State Constitution prepared by the Committee on State Government of the National Municipal League contains the following provision for a divisional appellate court: "Section 57. . . . The Supreme Court shall have power to sit in two or more divisions, when in its judgment this is necessary for the proper dispatch of business and to make rules for the distribution of business between the divisions and for the hearing of certain cases in full court."

The Model Constitution leaves all administrative details to the court and it is submitted that this is a better plan than that of California, for instance, which attempts to provide constitutional direction for every situation. Experience has demonstrated that constitutional details frequently rise to smite those for whose benefit they were intended. None of the courts functioning under the divisional plan have as few judges as five. Eight states have seven judges; three states, six; and three states, nine. Should North Carolina adopt this plan it would seem best to increase the number of judges to seven.

The following, based upon the Model Constitution, but incorporating the plan of having the chief justice sit with each division, is suggested as a proposed provision for North Carolina:

The Supreme Court shall consist of seven members. It shall have power to sit in two or more divisions, over each of which the Chief Justice, so far as is practicable, shall preside. The conduct of judicial business by the divisions and by the full court shall be governed by rules and regulations enacted by the Supreme Court.